

**FILED**

**JUN 28 2012**

United States Bankruptcy Court  
San Jose, California

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re	] Case No. 10-56300-ASW
ROMULO MILLAN,	] Chapter 11
Debtor.	]
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ROMULO MILLAN,	] Adv. Proc. No. 10-05227
Plaintiff,	]
vs.	]
ALLIANCE BANCORP; CHASE HOME	]
FINANCE, LLC; CALIFORNIA	]
RECONVEYANCE COMPANY; HOUNG CHAN	]
TU; QUOI GIA TRINH; and DOES 1-20,	]
Defendant.	]
_____	

**MEMORANDUM DECISION GRANTING MOTION TO DISMISS**

This matter comes before the Court on a Motion to Dismiss filed by Defendants Chase Home Finance<sup>1</sup> (hereafter "Chase") and California Reconveyance Company (hereafter "CRC"). Plaintiff Romulo Millan (hereafter "Mr. Millan") has opposed the Motion. The

<sup>1</sup> Movant is actually JPMorgan Chase Bank, N.A. ("JPMorgan"), which contends that JPMorgan is the successor by merger to Chase Home Finance, LLC.

1 Court has considered all of the papers filed by the parties and  
2 finds there is no need for oral argument. For reasons which the  
3 Court shall explain, the Motion to Dismiss is granted, and the  
4 Third Amended Complaint is dismissed without prejudice.

5 **Background**

6 After several Orders by this Court dismissing earlier filed  
7 complaints,<sup>2</sup> Mr. Millan filed a Third Amended Adversary Complaint  
8 one year ago on June 28, 2011. The Third Amended Complaint names  
9 the following Defendants: Alliance Bancorp (which has not entered  
10 an appearance and according to Mr. Millan has never been served),  
11 Chase, CRC, Hong Chan Tu (hereafter "Tu"), Quoi Gia Trinh  
12 (hereafter "Trinh"), and Does 1 through 20. Pursuant to an Order  
13 issued August 31, 2011, the Court dismissed all claims against Tu  
14 and Trinh without leave to amend.

15 The Third Amended Complaint generally alleges the wrongful  
16 trustee sale of real property located at 1594 Pebbles Beach Court,  
17 Milpitas, California (hereafter "the Property"). According to Mr.  
18 Millan, Mr. Millan had been participating in Chase's loan  
19 modification program and Chase had represented to Mr. Millan that  
20 the Property would not be sold until the loan modification process  
21 was completed. Mr. Millan alleges that Mr. Millan relied on Chase's  
22 representation and did not cure the default on Mr. Millan's loan.

23 Mr. Millan alleges that CRC, acting at Chase's request,  
24 executed a trustee's deed on July 31, 2009, transferring title to  
25 Tu and Trinh, and that the deed was recorded on August 5, 2009.  
26 Mr. Millan also alleges that on September 3, 2009, CRC issued a  
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28 <sup>2</sup> Such Orders were entered on September 11, 2010, January 31,  
2011, May 13, 2011, and September 9, 2011.

1 notice of rescission of the trustee's deed. Mr. Millan alleges  
2 that after September 3, 2009, Chase entered into a forbearance  
3 agreement in which Chase agreed that no steps would be taken by  
4 Chase to take title to the Property if Mr. Millan made payments of  
5 approximately \$4,338. Mr. Millan alleges that Mr. Millan made  
6 these payments. However, according to Mr. Millan, on May 7, 2010,  
7 CRC -- at Chase's request -- revoked the rescission of the  
8 trustee's deed.

9 Mr. Millan alleges that when the Property was sold, neither  
10 Chase, CRC, nor any authorized agent possessed the original  
11 promissory note. Mr. Millan alleges that there is a question as to  
12 ownership of the note, creating an issue as to the validity of the  
13 foreclosure. Mr. Millan alleges that there is no record of an  
14 assignment from Mortgage Electronic Registration Systems (hereafter  
15 "MERS") to US Bank, and that the only document supporting a valid  
16 assignment is a March 26, 2009 Substitution of Trustee in which US  
17 Bank, N.A., as trustee for WMALT 2007-OA1 substitutes CRC as  
18 trustee for the deed of trust.

19 The Third Amended Complaint asserts five claims for relief.  
20 The first three claims are asserted only against Chase and the  
21 unnamed Doe Defendants. The last two claims are asserted against  
22 all named Defendants. On all claims, Mr. Millan requests a jury  
23 trial.

24 Claim 1 -- entitled "Fraud as to Chase and Doe Defendants" --  
25 alleges that Chase made a representation that "any foreclosure  
26 proceedings would be stopped, and any sale date postponed pending  
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1 completion of the loan modification process."<sup>3</sup> Mr. Millan alleges  
2 that this representation was false, and that Mr. Millan relied upon  
3 it by making no further payments and refraining from actions to  
4 protect Mr. Millan's interest in the Property. Mr. Millan alleges  
5 that Mr. Millan was damaged in the approximate amount of \$300,000.<sup>4</sup>  
6 Mr. Millan also alleges that Chase's conduct was fraudulent,  
7 wanton, willful, and malicious, and that Chase intended to deprive  
8 Mr. Millan of Mr. Millan's right to the Property.

9 Claim 2 -- which is entitled "Negligent Misrepresentation  
10 against Chase and Doe Defendants" -- alleges that Chase negligently  
11 made the representation referenced in Claim 1, and that Mr. Millan  
12 reasonably relied upon the representation, to Mr. Millan's  
13 detriment.

14 Claim 3 -- entitled "Unfair Business Practices against Chase  
15 and Doe Defendants" -- alleges that Chase is a debt collector  
16 within the meaning of the Rosenthal Act, California Civil Code  
17 § 1788 (hereafter "the Act"), and that Chase violated the Act by  
18 sending deceptive letters and making phone calls to demand payment.  
19 Mr. Millan also alleges that Chase made false statements about the  
20 amount of Mr. Millan's debt, Mr. Millan's payment history, and Mr.  
21 Millan's compliance with the loan modification program's  
22 requirements.

23 Claim 4 is asserted against all Defendants. The claim seeks  
24 to set aside or rescind the trustee's deed because of the following  
25 alleged irregularities in the sale: (1) the representation made by

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26  
27 <sup>3</sup> There are no allegations concerning who at Chase made this  
statement or when the statement was made.

28 <sup>4</sup> Mr. Millan alleges that the Property was sold for \$300,000  
below fair market value.

1 Chase which forms the basis of Claims 1 and 2; (2) the invalidity  
2 of an assignment from MERS to U.S. Bank, N.A., as trustee for WMALT  
3 2007-OA1.33; (3) the failure to include a properly executed  
4 declaration pursuant to Cal. Civ. Code § 2923.54 -- a statute  
5 which, incidentally, has been repealed; (4) the notice of sale was  
6 not posted at Mr. Millan's residence; and (5) the amount sought in  
7 the notice of sale (\$889,036.50) exceeded the amount permitted  
8 under the adjustable rate rider, which was 110% of \$750,000.

9 Claim 5 seeks declaratory relief. Among other things, Mr.  
10 Millan seeks a declaration that Chase and CRC lacked standing to  
11 foreclose on the Property, as well as a declaration that Mr. Millan  
12 owns the Property.

13 **Issues Presented**

14 In their Motion to Dismiss, Chase and CRC raise several  
15 arguments. First, Chase and CRC contend that the Third Amended  
16 Complaint was not properly or timely served. Chase and CRC also  
17 argue that they had standing to foreclose on the Property. Chase  
18 and CRC further argue that Claim 4 fails because Mr. Millan has  
19 failed to allege tender, or the ability to make tender. As for  
20 Claims 1 and 2, Chase argues that Mr. Millan has failed to plead  
21 these claims with the requisite particularity. Chase also argues  
22 that Claim 3 fails as a matter of law, because Chase is not a "debt  
23 collector" within the meaning of the Act, and non-judicial  
24 foreclosure is not an activity covered by the Act. Chase and CRC  
25 argue for dismissal of Claim 4 on the basis that Defendants have  
26 complied with the California law requirements for non-judicial  
27 foreclosure, and the statute cited by Mr. Millan in Claim 4 has  
28 been repealed and never provided a private right of action.

1 Finally, Defendants argue for dismissal of Claim 5, because a claim  
2 for declaratory relief cannot be a freestanding cause of action.

3 Mr. Millan opposes the Motion. Mr. Millan claims that both  
4 Chase and CRC were personally served or waived service. As to the  
5 substantive arguments for dismissal, Mr. Millan contends that the  
6 public records do not demonstrate either Defendant's authority to  
7 foreclose and asserts that the trustee's sale is void. Mr. Millan  
8 also contends that he has adequately pled his claims, and that no  
9 tender was required because Mr. Millan seeks to set aside the  
10 trustee's sale. Alternatively, Mr. Millan contends that the tender  
11 requirement should be waived as inequitable. Mr. Millan also  
12 expresses an intention to plead a new claim of promissory estoppel  
13 in a Fourth Amended Complaint.

14 The Motion to Dismiss is accompanied by Chase and CRC's  
15 request for judicial notice. Mr. Millan does not dispute that the  
16 Court may take judicial notice of public records, but contends that  
17 the Court should not consider the content of such records. It is  
18 not necessary to reach this issue, because the Court's ruling does  
19 not take into consideration any of the documents for which Chase  
20 and CRC have requested judicial notice.

21 **Analysis**

22 The Court only needs to address the first argument raised by  
23 Chase and CRC that all claims against Chase and CRC should be  
24 dismissed pursuant to Fed. R. Civ. P. 12(b) for lack of proper  
25 service of the Third Amended Complaint. Both Chase and CRC assert  
26 that neither have ever been properly served with the Third Amended  
27 Complaint. Chase contends that Mr. Millan was required to serve  
28 the Third Amended Complaint on Chase by certified mail on a named

1 officer in accordance with Fed. R. Bankr. P. 7004(h), but that Mr.  
2 Millan never did so. In addition, both Chase and CRC contend that  
3 the Third Amended Complaint was not served on either Chase or CRC  
4 within the 120-day period required by Fed. R. Civ. P. 4(m).

5 Mr. Millan responds that with regard to service on Chase, Mr.  
6 Millan was not required to comply with Rule 7004(h) because Mr.  
7 Millan served the summons with the Third Amended Complaint, or  
8 alternatively, that Chase has "tacitly waived" service. Mr. Millan  
9 also points to two returns of service filed in the main bankruptcy  
10 case to demonstrate that the Third Amended Complaint was mailed by  
11 first class mail to CRC on January 2, 2012 and to Chase on January  
12 27, 2012.<sup>5</sup>

13 A party may move to dismiss a complaint under Fed. R. Civ. P.  
14 12(b)(5) for insufficient service of process. In determining such  
15 a motion, the Court may consider matters outside the pleadings.  
16 Compare Fed. R. Civ. P. 12(d) (which prohibits consideration of  
17 matters outside the pleadings for motions brought under Rule  
18 12(b)(6) or 12(c) without converting the motion to one for summary  
19 judgment); see also In re American Camshaft Specialties, Inc., 410  
20 B.R. 765, 772 (Bankr. E.D. Mich. 2009). Mr. Millan bears the  
21 burden of proving that there was valid service of process. See 4A  
22 Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE  
23 § 1083 (3d. Ed. 2002 & Supp. 2012) ("As numerous cases make clear,  
24 the party on whose behalf service of process is made has the burden  
25 of establishing its validity when challenged; to do so, she must  
26 demonstrate that the procedure employed to deliver the papers

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<sup>5</sup> There is no summons mentioned in either return of service.

1 satisfied the requirements of the relevant portions of Rule 4 and  
2 any other applicable provision of law.").

3 Under Fed. R. Civ. P. 4(c)(1) and (m), made applicable to  
4 adversary proceedings by Fed. R. Bankr. P. 7004(a)(1), a summons  
5 and complaint must be served on a defendant within 120 days after  
6 the filing of a complaint. Failure to serve a summons and  
7 complaint within such time period requires a court to either  
8 dismiss the complaint, without prejudice, or to order that service  
9 be made within a specified time.

10 In adversary proceedings, service upon an FDIC-insured  
11 institution must be accomplished in accordance with Fed. R. Bankr.  
12 P. 7004(h), which provides:

13 Service on an insured depository institution  
14 (as defined in section 3 of the Federal Deposit  
15 Insurance Act) in a contested matter or  
16 adversary proceeding shall be made by certified  
mail addressed to an officer of the institution  
unless--

17 (1) the institution has appeared by its  
attorney, in which case the attorney shall be  
served by first class mail;

18 (2) the court orders otherwise after  
19 service upon the institution by certified mail  
of notice of an application to permit service  
20 on the institution by first class mail sent to  
an officer of the institution designated by the  
21 institution; or

22 (3) the institution has waived in writing  
its entitlement to service by certified mail by  
23 designating an officer to receive service.

24 The Third Amended Complaint was filed with the Court on June  
25 28, 2011. Therefore, to be timely under Fed. R. Civ. P. 4(m),  
26 service of the Third Amended Complaint should have been  
27 accomplished by October 26, 2011. A certificate of service filed  
28 with the Court on June 29, 2011, shows that the Third Amended



1 Complaint -- but no summons - was mailed by first class mail to  
2 Chase and CRC. The two summonses dated January 2, 2012 and January  
3 27, 2012, likewise show no service of a summons with the Third  
4 Amended Complaint. In short, the record is devoid of any proof  
5 that Mr. Millan served either Chase or CRC with a summons and Third  
6 Amended Complaint at any time.

7 In addition, Mr. Millan has not made any showing that Chase,  
8 as an FDIC-insured institution, was properly served under Rule  
9 7004(h). In this case, Chase has not appeared by its attorney  
10 within the meaning of Rule 7004(h)(1), nor waived in writing  
11 Chase's entitlement to service by certified mail. Further, the  
12 Court has not ordered that service of the Third Amended Complaint  
13 on Chase should be in any manner apart from what Rule 7004(h)  
14 requires.

15 At a hearing held January 24, 2012 on a December 15, 2011  
16 Order to Show Cause directing Mr. Millan to show why the case  
17 should not be dismissed for lack of prosecution, counsel for Mr.  
18 Millan agreed that Chase had not yet been served.<sup>6</sup> Counsel for  
19 Chase and CRC also mentioned that neither Chase nor CRC had been  
20 served with a summons. The Court advised Mr. Millan that the Court  
21 would give Mr. Millan one final opportunity to serve Chase and CRC  
22 effectively with updated summonses and the Third Amended Complaint,  
23 and stated that absent proper service, the Court would dismiss the  
24 Third Amended Complaint. Because Mr. Millan has made no showing  
25 that service of process was ever properly accomplished on Chase and  
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27 <sup>6</sup> This was not the first time Mr. Millan failed to serve Chase  
28 or CRC properly. In a Case Management Conference Statement filed  
December 6, 2010, Mr. Millan conceded that Mr. Millan did not serve  
Chase or CRC with the original complaint filed five months earlier  
on July 6, 2010.

1 CRC, and because none of the Defendants remaining in this action  
2 have been served, the Motion to Dismiss is granted, and the Third  
3 Amended Complaint is dismissed, without prejudice.

4 IT IS SO ORDERED.

5  
6  
7 Dated:

6/28/12



ARTHUR S. WEISSBRODT  
UNITED STATES BANKRUPTCY JUDGE

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